Supreme Court, U.S.
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No._____

In The
Supreme Court Of The United States

FEROL DECKER,
Petitioner

v.

EMILIO URRUTIA and PENSKE TRUCK\ LEASING CO., L. P
Respondents

Petition for a Writ of Certiorari To The Texas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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75cp

FIRST QUESTION PRESENTED

Does it violate a litigants constitutional rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution for the highest court of a state to intentionally refuse to apply settled law to the uncontroverted facts of a case?

SECOND QUESTION PRESENTED

Does it violate a litigants constitutional rights under the Equal Protection of the Law Clause of the Fourteenth Amendment to the United States Constitution for the highest court of a state to intentionally refuse to apply settled law to the uncontroverted facts of a case?

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BASIS FOR JURISDICTION

(i) The date of the Texas Supreme Court judgment sought to be reviewed herein was April 8, 1999.

(ii) The Texas Supreme Court overruled Petitioner's Motion for Rehearing raising Federal questions on July 1, 1999.[1]

(iii) Final judgments rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where a right is set up under the Constitution of the United States as authorized by 28 U.S.C.A. § 1257 (a).

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[1] The Texas Supreme Court is the highest court of final resort on issues of law. Tex. Const. Art. V. § 3; Tex. Gov. C. 22.001 (a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

(i) **U.S. Const. Amend. 14, §1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make of enforce any law which shall abridge the privi8leges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(ii) **Tex. Ins. Code, Art. 5.06(2).** Except as provided by Subsections (3) and (4) of this article, an insurer may only use a form adopted by the Board under this section in writing motor vehicle insurance delivered, issued for delivery, or renewed in this State. A contract or agreement not written into the applciation and policy is void and of no effect and in violation of the provisions of this subchapter, and is sufficient cause for revocation of license of such insurer to write automobile insurance within this State.

(iii) **Tex. Ins. Code, Art. 5.98.** The State Board of Insurance may adopt reasonable rules that are appropriate to accomplish the purposes of this chapter.

(iv) **Texas Standard Provisions for Texas Auto Policies Business Auto Coverage Form, Garage Coverage Form, Truckers Coverage Form Special Instructions, Sec. 1.** These forms are expressed in standard language which may not be amended and no part of which may be omitted except (a) as indicated by these instructions, or (b) as indicated in reference notes shown below referring to specific portions of the form, or (c) by an endorsement which states an amendment or exclusion of som provision of the form in accordance with the provisions of a manual rule, in the form of which endorsement has been approved by the Board.

IN THE

SUPREME COURT OF THE UNITED STATES

FEROL DECKER, *Petitioner*

v.

EMILIO URRUTIA and PENSKE TRUCK LEASING CO., L.P., *Respondents*

Petition for a Writ of Certiorari
To The Texas Supreme Court

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Ferol Decker, prays that a writ of certiorari issue to review the opinion of the Texas Supreme Court, issued April 8, 1999.

OPINIONS BELOW

The opinion of the Court of Appeals, *Decker v Urrutia et.al.*, 965 S.W.2d 26 (Tex. App. [Hou. 1st] pet. granted), is reprinted as Appendix J. The opinion issued on motion for rehearing is reprinted as Appendix I.

The opinion of the Texas Supreme Court , *Urrutia et. al v Decker*, 992 S.W.2d 440 (Tex. 1990) is reprinted as Appendix H.

STATEMENT OF THE CASE

(A) Federal Questions Raised

The trial court granted summary judgment against Petitioner. The court of appeals reversed and remanded the case to the trial court. (Appendix I,J) The Supreme Court of Texas reversed the judgment of the court of appeals and rendered judgment against Petitioner. (Appendix H) The Petitioner filed a Motion for Rehearing and complained that the court arbitrarily and capriciously failed to apply clearly established Texas law applicable to the undisputed facts in the case resulting in Petitioner's denial of rights under the Equal Protection Clause and the Due Process Clause contained in the Fourteenth Amendment of the United States Constitution. (Appendix B) The motion was overruled by the court. (Appendix A)

(B) Facts Material To Consideration Of The Questions Presented

Old Republic Insurance Company issued a million dollar Texas liability insurance policy to Penske Truck Leasing Co., L.P. (Penske). The policy was on a form promulgated by the Texas Board of Insurance. The policy not only insured Penske for one million dollars but also insured any driver operating an insured vehicle with the consent of Penske. (Appendix E). The policy had several endorsements attached, the only relevant one being the one which amended the definition of "who is an insured" and delegated authority to Penske to determine the extent and limits of liability afforded to its lessees and rentees in any rental agreement. (Appendix F) The endorsement was not approved by the State Board of Insurance. (This endorsement will be hereinafter referred to as the "Pennsylvania endorsement".)

Penske subsequently rented a truck to Emilio Urrutia (Urrutia) which was insured under the Old Republic policy. While Urrutia was operating the vehicle he crossed over into the lane of traffic occupied by Petitioner. A collision occurred which resulted in serious injuries to Petitioner. His medical bills alone exceeded

$100,000.00. He was hospitalized for several days and was released with pins in his legs.

An insurance adjuster representing Old Republic contacted Petitioner and stated that there was only $20,000.00 to settle this personal injury claim. Based upon these representations Petitioner settled his case for this amount. He later discovered that the policy actually afforded one million dollars coverage and filed suit and requested the court to set aside the settlement agreement for fraud or in the alternative mutual mistake.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(A) General

This case does not consist of erroneous factual findings or the misapplication of a properly stated rule of law but consists of the intentional misstatement of the law and the facts to achieve a result oriented judgment. The notoriety of the Texas Supreme Court in ruling in favor of insurance companies at all costs has been of concern not only to the citizens of the state of Texas but has also drawn national attention. (See Appendix K) In this case the unanimous court overtly and with impunity misrepresents its own precedents, misrepresents the facts as found by the highest fact finder in the state, misrepresents the legal effect of documents, conceals rules and insurance forms promulgated by the State Board of Insurance pursuant to statute, all in an effort to assist an insurance company from paying Petitioner adequate damages to compensate him for his injuries, a valuable property right protected by the Fourteenth Amendment to the Constitution of the United States.

(B) Contentions In Support Of Petition For A Writ O Certiorari

The Court of Appeals, as is its duty as highest fact finding Court of this State, found that the Pennsylvania endorsement was

not prescribed or approved by the State Board of Insurance[1]. (Appendix J-5) The endorsement is void under Article 5.06(2) of the Texas Insurance Code (*supra*).

This endorsement is void as a matter of law under well-established case law. *Commercial Union Assurance Co. v. Preston*, 282 S.W.563 (Tex. 1926); *Mutual Life Ins. Co. v. Daddy$ Money*, Inc., 646 S.W.2d 255 (Tex. App. 5th Dist., 1982, no writ). See also *Springfield v Aetna Cas. & Sur. Ins. Co.*, 620 S.W.2d 557 (Tex. 1981)[use of unapproved endorsements subjects insurers to revocation of license]; *United States Ins. Co. of Waco v Boyer*, 269 S.W.2d 340 (Tex. 1954)[unlawful to use unapproved endorsements].

The endorsement is further made void under existing insurance regulations having the effect of statutes. I March, 1992, the Texas Insurance Commissioner promulgated rules pursuant to statute (Tex. Ins. Code, Art. 5.98, *supra*) to be used in writing motor vehicle insurance in this state. (Appendix C). Paragraph 1 entitled "Standard Language" provides as follows: "These forms are expressed in standard language which may not be amended and no part of which may be omitted except (a) as indicated by these instructions, or (b) as indicated in reference notes shown below referring to specific portions of the form, or (c) by an endorsement which states an amendment or exclusion of some provision of the form in accordance with the provisions of a manual rule, in the form of which endorsement has been approved by the Board." (emphasis added)

A Standard Business Auto Coverage Form prescribed by the Commissioner of Insurance defining who is an insured is attached. (Appendix D). The unapproved Pennsylvania endorsement which amended this section and substituted the controversial definition of "both lessees and rentees of covered autos as insured, but only to the extent and for the limits of liability agreed to under contractual agreement with the named insured" is an unauthorized amendment and is a nullity. Old Republic could only have amended this section and added rentees

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[1] A judgment of a court of appeals is conclusive in all cases on the facts of the case. Tex. Const. Art. V. § 6; Tex. Gov. C. § 22.225(a).

and lessees as additional insureds if it used the endorsement promulgated by the Commissioner. (Appendix G)

The Pennsylvania endorsement is clearly void under existing case law, statutory law and administrative law. The insurance policy issued by Old Republic Insurance Company without this endorsement provides $1,000,000.00 liability coverage to Emilio Urrutia since he was an authorized driver under the rental agreement. Futhermore, without this endorsement it is immaterial how much insurance was contracted for between Penske and Urrutia in the rental agreement.

Rather than hold this endorsement void, however, the Texas Supreme Court embarks on a series of fraudulent misrepresentations of law and fact that in the best light can only be labeled "judicial fraud".

(1) Judicial Fraud Number One

The court comments that the Court of Appeals found the Pennsylvania endorsement valid. (Appendix H-4). On the contrary, the court of appeals factually found that "it is uncontested that the endorsement form involved in this case (the Pennsylvania endorsement) was not prescribed or approved by the State Board of Insurance." (Appendix J-5) Prior to this statement and within the same paragraph the court stated "Insurers are required by law to use the endorsement forms prescribed by the State Board of Insurance". The court appended to its own opinion the forms promulgated by the Board that should have been used in this case. (Appendix G). Although the Court of Appeals never specifically held the Pennsylvania endorsement void it would follow as a logical conclusion. In no way can the court of appeals opinion be construed as finding the Pennsylvania endorsement valid as the Supreme Court so boldly belies. This misrepresentation was necessary to make the insuring provisions in the rental agreement relevant (under Judicial Fraud Number Two) so the court could enter its arbitrary and capricious ruling limiting the insurance company's liability and denying Petitioner recovery for the full extent of his injuries. The court was fully

aware that the voiding of the Pennsylvania endorsement exposed the insurer to the amount of liability stated in the policy.

(2) Judicial Fraud Number Two

The Supreme Court cites its own decision in *Commercial Union Assurance Co. v. Preston*, supra for the proposition that the language in the unapproved endorsement must conflict with board-approved provisions in order to be unenforceable. (Appendix H-5,6) Since the rental contract did not conflict with any approved standard form the court concludes the facts in this case are distinguishable from those in *Commercial Union*. This is the most egregious misrepresentation of law in the entire opinion. *Commercial Union* found that an unapproved endorsement is void. In *Commercial Union* the then Texas Supreme Court stated (p. 565):

> "We agree with the Court of Civil Appeals that a clause or endorsement added to the standard form of fire insurance policy, without the authorization or approval of the state insurance commission, is void (emphasis added) under article 4891, Complete Texas Statutes, now articles 4888 and 4889, R.S. of 1925; otherwise true effect cannot be given to the prohibition that no other forms be used than those established or approved by the commission (emphasis added)."

The court then cited its own case of *First Texas State Ins. Co. v. Smalley*, 111 Tex. 72, 228 S.W. 550 as authority for the foregoing proposition of law. But the court didn't stop there. It continued on and gave the reasoning behind such regulatory statutes (p.565):

> "This act is broad and sweeping in its terms and scope. It aims to bring order out of chaos. Prior to its passage there were as many different contracts of insurance as there were companies. The variations and differences between the conditions of the policies issued by the various insurance companies were almost infinite in number; new

clauses and conditions were being constantly inserted, generally ingeniously worded and obscurely printed; and, singularly enough, these new conditions were always in the interest of the insurer, and not of the insured. To meet this condition, the act under consideration was passed. That it is a long step in the right direction cannot be doubted. Under it there can be practically but one form of policy. When a man contracts for insurance, he knows that he is contracting for a standard policy and for nothing else, and he knows that he will get that and nothing else."

When a statute such as the foregoing has been construed by the highest court having jurisdiction to pass on it such construction is as much a part of the statute as if plainly written into it originally. *Winters v. People of State of New York*, 333 U.S.507.

For seventy-three years endorsements used by insurers which have not been approved by the Insurance Commission have been declared void. The rule of stare decisis is highly binding in this field. In *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182 (Tex. 1968) a more responsible supreme court wrote the following (p.193):

" It is one thing for the judicial branch to amend a statute and quite another thing to modify a rule of common law. And, to overrule a court's uniform interpretation of a statute which has persisted over a long period of years as evidenced by numerous decisions, is very like amending a statute. That is why the rule of stare decisis is highly binding in this field. A series of holdings by a court of last resort should operate as an axiom or new starting point, so to speak, and if a reexamination of all decisions is to be made upon all occasions, the rule would serve no purpose and there would be no certainty in the law."

Stare decisis applies with particular force in decisions involving insurance policies "which parties have probably relied in conducting their personal, family, and business affairs". *Marmon* (supra) (*f.3*, p.193).

In the case of *James v. Vernon Calhoun Packing Co.*, 498 S.W.2d 160 (Tex. 1973) the Texas Supreme Court observed that in dealing with statutory construction (in this case a workman's compensation statute) the doctrine of stare decisis has its greatest force. The court held as follows (p. 163):

> "The Legislature has met in regular session eighteen times since Woolsey was decided in 1938, and the statutory provision in question has not been changed. In these circumstances and since the construction adopted 35 years ago is entirely reasonable, it is our opinion that the meaning of the statute should not be changed now except by legislative enactment."

In the instant case the legislature has met 36 times since the ruling in *Commercial Union*. The only change made by the legislature during that time was to delegate additional authority to the Commissioner of Insurance strengthening its exclusive control over the forms used in writing motor vehicle insurance. As noted above, Article 5.06 (2) of the Texas Insurance Code regulates the use of forms used by insurance companies in writing motor vehicle insurance in this state. In 1991, Article 5.06 was amended, effective September 1, 1991 directing the Board of Insurance to adopt policy forms and endorsements for each type of motor vehicle insurance. (Acts 1991, 72nd Leg., ch.242, §2.07, *eff.* Sept. 1, 1991) Prior to this statutory amendment no forms were created by the board, rather, each policy and endorsement was approved on a case by case basis. Effective March 18, 1992, policies and endorsements are required to be issued on the forms created by the board. Pursuant to this statutory mandate the Texas Automobile Rules and Rating Manual was created containing inter alia the forms to be used by rental car companies in limiting coverage to lessees and rentees. (Appendix C, D and G).

This court has written on the doctrine of stare decisis as well. In Thomas v. Washington Gas Light Co., 448 U.S. 261, this court wrote (p. 273):

"The doctrine of stare decisis imposes a severe burden on the litigant who asks us to disavow one of our precedents. For that doctrine not only plays an important role in orderly adjudication; it also serves the broader societal interests in evenhanded, consistent, and predictable application of legal rules. When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force."

But the irony in the instant case is the Supreme Court doesn't overrule *Commercial Union;* it simply misrepresents its holding. After finding that the insurance provisions in the rental agreement constitutes an endorsement "supplying the limits of coverage" (Appendix H-5) and in the same breath acknowledging it lacks board-approval (Appendix H-6) it continues on and finds the endorsement "voidable" (Appendix H-7). It then concludes that since Urrutia (the lessee) accepted insurance benefits through the rental agreement the court of appeals "erred in voiding the insurance provisions merely because they were not written on forms prescribed by the State Board of Insurance." (Appendix H-6). Merely because? By its own words the court shows contempt for precedent and the governing statutes. The Court of Appeals voided the insurance provisions of the rental agreement merely because it followed the rule of stare decisis and the commands of the statute.

The court's opinion is whimsical in other respects as well. Consider the following: the court in its opinion (Appendix H-5) states that "insurers who do not use board-approved policies and endorsements may be subject to a penalty and cites its own case of *Springfield v. Aetna Cas. & Sur. Ins. Co.*, 620 S.W.2d 557, 558 (Tex. 1981). However, rather than penalizing the insurance company the court rewards it by allowing it to escape payment of a claim, worth close to policy limits because of the disability of Petitioner, for the meager sum of $20,000. A fortiorari, because Old Republic paid this sum to Petitioner the court concludes that Urrutia has accepted benefits under the rental agreement and assigns this as the main reason why the Court of Appeals erred in voiding the insurance provisions therein. (Appendix H-6). This conclusion is devoid of any reasoning since the insurer gets credit

for this amount if the release is set aside. In addition the court states (also Appendix H-5) insurers who do not use board appointed policies and endorsements may not be able to enforce agreements written on unapproved forms. Yet the court concludes its opinion by holding the Court of Appeals erred in voiding the insurance provisions in the rental agreement "merely because" they were not written on forms prescribed by the State Board of Insurance. The vacillating nature of the opinion illustrates the court's knowledge of precedent but outright refusal to follow it. The bottom line of the court's opinion is to limit the insurance company's liability. It adds nothing to the jurisprudence of this state.

(3) Judicial Fraud Number Three

The court represents that Urrutia's coverage is dependent on the Texas rental contract and the Pennsylvania endorsement. (Appendix H-4) Not so. Texas law requires all insurance policies insuring motor vehicles in this state to contain a clause insuring drivers operating the insured vehicle with the consent of the named insured, commonly referred to as an omnibus clause. (Appendix D). The policy in the instant case insured any driver using the insured vehicle with the consent of Penske for $1,000,000 whether he is operating the vehicle under a rental agreement or not. (Appendix E). The Texas Supreme Court has written about omnibus clauses before. *Weaver v. Hartford Acci. Indem. Co.*, 570 S.W.2d 367 (Tex. 1978). However, the current justices draw a blank. For the chief justice to write that Urrutia's coverage depends on two void endorsements is remarkable indeed. But of graver concern to the citizens of Texas is that their Supreme Court has now delegated authority to car rental agencies to write endorsements to motor vehicle insurance policies, a matter delegated by the Texas legislature to the Commissioner of Insurance.

The court further accuses the Court of Appeals of "selective application of the rental contract" by relying on the rental agreement to identify Urrutia as the insured but void for insurance purposes. (Appendix H-4). The provision of the rental contract authorizing Urrutia to operate the vehicle is on the first

page of the rental contract. The insuring provisions sought to be declared void are on the back. (Appendix B-5). The authorization to Urrutia to operate the vehicle is a crucial component of the rental contract. The authorized driver must produce a valid Texas operator's license. If the company so chooses, it may also obtain a copy of the authorized driver's driving record. This is done so that the rental car company can satisfy its duty and place the vehicle, hopefully, in the hands of a competent driver. Selecting a competent driver has nothing to do with insurance. This is common knowledge to anyone who has ever rented a motor vehicle. Since nine members of the court cannot possibly be that naïve, this accusation is made solely for the purpose of blocking the identity of Urrutia as a consent driver under the omnibus clause. There is method to each element of the court's madness.

(4) Judicial Fraud Number Four

The Supreme Court's opinion cites a line of cases out of various federal and state courts dealing with unapproved policies.(Appendix H-6). Unapproved policies has nothing to do with this case. The policy in this case is an approved Texas policy. No one has claimed otherwise since the inception of this case. But even if there were a problem with the policy it is not the law in this state that the insured must accept the good along with the bad as those cases are alleged to represent. In *National County Mutual Fire Insurance Company v. Johnson*, 879 S.W.2d 1, (Tex. 1993) the Texas Supreme Court declared void a family member exclusion in an automobile policy as against public policy requiring everyone to have insurance pursuant to the Safety Responsibility Act. The remainder of the policy was then enforced as written. No mention was made of having to accept the good with the bad in the opinion.

The one case cited by the court, and probably by mistake, *Mutual Life Ins. Co. of N.Y. v. Daddy$ Money, Inc.*, 646 S.W.2d 255 (Tex.App.—Dallas 1982, writ ref. n.r.e.) is misquoted by the court. That case held that an unapproved endorsement is a nullity whether it conflicts with the policy or not.

(5) Judicial Fraud Number Five

Finally, by footnote on page eight of its opinion (Appendix H-6,7) the court cites legislation enacted after Petitioner's accident affecting rental car companies. The court makes the curious comment that "The Commissioner of Insurance has, in turn, adopted new policy forms and rules to implement the new statute." The court appears to be heralding the arrival of an antidote for a heretofore incurable malady. The court completely ignores the legislation passed in 1992 resulting in the creation of forms to be used by rental companies. (Appendix C ,G). These forms were passed out to each member of the court at oral argument on January 13, 1999. (Appendix B-7). These forms were promulgated by the Insurance Commissioner for the sole purpose of allowing the insurance company to do what it wants to do in this case, i.e. limit insurance coverage to rentees and lessees. These same forms were referred to in the Court of Appeals opinion. (Appendix J-5). They were also attached to the Motion for Rehearing (Appendix B-7, G) No mention of these forms is contained in this opinion. One plausible explanation for their omission is to intentionally deny Petitioner the benefit of the law requiring these forms be used. Another and more likely explanation for their omission is that the Supreme Court is making a feeble effort to dupe anyone reading this opinion in believing that they don't exist.

(C) Reasons Relied On For Allowance Of The Writ As To The First Question Presented

The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673.

This court has defined due process of law as follows:

> "Whatever differences may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the enforcement and protection of private rights." *Pennoyer v. Neff*, 85 U.S. 733; *Black's Law Dictionary*, 4th Edition

When a state court of the highest resort abandons those rules and principles which have been established in its system of jurisprudence for the enforcement and protection of private rights, as has been shown in this case, it not only violates the due process rights of the individual litigants but also fosters contempt for the law and mistrust of the legal system. That is why this case is so important and should be heard and atonement made by this court. For if there is no justice in this court there is no justice anywhere for Petitioner or anyone else who litigates against an insurance company in the State of Texas.

(D) Reasons Relied On For Allowance Of The Writ As To The Second Question Presented

Petitioner attached a transcript from the television show "60 MINUTES" entitled "JUSTICE FOR SALE" which aired on CBS on November 1, 1998. (Appendix K). *Burrelle's Transcripts*, Vol. XXXI, Number 7, November 1, 1998, "60 MINUTES". The purpose of this transcript is not to prove any issue on the merits of the case but to show reasons why the case should be heard. The transcript shows the philosophical swing of the Texas Suprem Court in the last twelve years away from "approving fat malpractice awards" to ruling for insurance companies "roughly 90 percent of the time". (Appendix K-2,3). The transcript further shows the enigmatic nature of the chief justice, Tom Phillips who admittedly won election by campaigning on the slogan saying "no to big money" and yet has acknowledged raising "more money in campaign contributions than any supreme court judge in Texas history." (Appendix K-2,8). The essence of the entire commentary

is useful in providing insight into the court's motivation in misrepresenting its own precedents, misrepresenting the facts as found by the highest fact finder in the state, misrepresenting the legal effect of documents and concealing rules and insurance forms promulgated by the State Board of Insurance pursuant to statute in this case. As surely as this court would strike down a decision by the highest court of a state if it were based solely upon race under the equal protection clause it should strike down a decision by the highest court of a state skewed solely to favor an insurance company.

CONCLUSION

Petitioner requests this court to hear this case and enter a ruling, not interpreting the law of the State of Texas but to enforce the law which the Texas Supreme Court refuses to do. The Pennsylvania endorsement is void under Article 5.06(2) of the Insurance Code, the Special Instructions promulgated by the Insurance Commissioner and the Supreme Court decisions heretofore issued by the Texas Supreme Court. The insurance provisions of the rental contract are void as an endorsement to the policy under the same authorities. Failure of the court to apply the well established statutory and case law to the undisputed facts in this case constitute an arbitrary and capricious denial of DECKER'S rights under the Equal Protection Clause and the Due Process Clause contained in the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF TEXAS
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July 01, 1999

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RE: Case Number 98-0554
Court of Appeals Number: 01-96-01560-CV
Trial Court Number: 96-018236

Style: EMILIO URRUTIA and PENSKE TRUCK LEASING CO., L.P.
v.

FEROL DECKER

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause, as corrected.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin
Blanca E. Morin, Deputy

cc: The Honorable Olen Underwood
Ms. Margie Thompson, Clerk
Mr. Charles Bacarisse

APPENDIX B

No. 98-0554

IN THE SUPREME

COURT OF TEXAS

EMILIO URRUTIA and PENSKE
TRUCK LEASING CO., L.P.,

Petitioners

VS

FEROL DECKER

Respondent

MOTION FOR REHEARING

TO THE HONORABLE JUSTICES OF SAID COURT:

COMES NOW MOVANT, FEROL DECKER(DECKER), and files this his MOTION FOR REHEARING and in support hereof would show the Court as follows:

POINT OF ERROR

The Supreme Court erred in reversing and rendering this case for the reasons that it arbitrarily and capriciously failed to apply clearly established Texas law applicable to the undisputed facts in the case. Such failure results in denial of DECKER'S rights under the Equal Protection Clause and the Due Process Clause contained in the Fourteenth Amendment of the United States Constitution.

ARGUMENT AND AUTHORITIES

The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 1930, 50 S.Ct.451, 281 U.S. 673, 74 L. Ed. 1107.

This Court has once again by unaminous decision insulated an insurance company from liability. The Court finds error in the Court of Appeals opinion because it refused to validate an endorsement in an insurance policy that was "merely" void. Since the Court has arbitrarily and capriciously ignored long standing statutory and case law it is clear from the opinion that the Court has decided this case on a result oriented basis in violation of DECKER'S rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The Court begins its opinion by referring to a "Pennsylvania endorsement" attached to the Texas policy. Without this endorsement Emilio Urrutia would be an insured under the policy for $1,000,000.00 under the omnibus clause because he was driving with the consent of Penske Truck Leasing Company, the named insured under the policy. The Court of Appeals, as is its duty as highest fact finding Court of this State, found that the Pennsylvania endorsement was not prescribed or approved by the State Board of Insurance. (P. 5 of the opinion "I is uncontested that the endorsement form involved in this case was not prescribed or approved by the State Board of Insurance.") This endorsement is void as a matter of law under well established case law. *Commercial Union Assurance Co. v. Preston*, 282 S.W.563 (Tex. 1926); *Mutual Life Ins. Co. v. Daddy$ Money*, Inc., 646 S.W.2d 255 (Tex. App. 5th Dist., 1982, no writ). See also *Springfield v Aetna Cas. & Sur. Ins. Co.*, 620 S.W.2d 557 (Tex. 1981)[use of unapproved endorsements subjects insurers to revocation of license]; *United States Ins. Co. of Waco v Boyer*, 269 S.W.2d 340 (Tex. 1954)[unlawful to use unapproved endorsements].

The endorsement is also void under Article 5.06(2) of the Texas Insurance Code which provides that "... .an insurer may only use a form adopted by the Board under this section in writing

motor vehicle insurance delivered, issued for delivery, or renewed in this State."

The endorsement is further made void under existing insurance regulations having the effect of statutes. As part of DECKER'S summary judgment evidence he offered a packet of standard forms certified to by the Commissioner of Insurance. *Tr. 000145* Accompanying those forms are Special Instructions promulgated by the Commissioner. *Tr. 000146* Paragraph 1 entitled "Standard Language" provides as follows: "These forms are expressed in standard language which may not be amended and no part of which may be omitted except (a) as indicated by these instructions, or (b) as indicated in reference notes shown below referring to specific portions of the form, or (c) by an endorsement which states an amendment or exclusion of some provision of the form in accordance with the provisions of a manual rule, in the form of which endorsement has been approved by the Board." (emphasis added)(See attached Exhibit "A") Article 5.98 of the Insurance Code authorizes the State Board of Insurance to adopt these Special Instructions to accomplish its purpose in creating standard policy forms and endorsements.

A Standard Business Auto Coverage Form prescribed by the Commissioner of Insurance is also in the record. *Tr. 000151 thru 000159* The third definition of "Who Is An Insured" is as follows: "Anyone liable for the conduct of an insured described above but only to the extent of that liability. However, the owner or anyone else from whom you hire or borrow a covered auto is an insured only if that auto is a trailer connected to a covered auto you own."[1] (See attached Exhibit "B") The unapproved Pennsylvania endorsement which amended this section and substituted the controversial definition of "both lessees and rentees of covered autos as insured, but only to the extent and for the limits of liability agreed to under contractual agreement with the named insured" is an unauthorized amendment and is a nullity. (See attached Exhibit "D") Old Republic could only have amended this section and added rentees and lessees as additional insureds if it used the endorsement promulgated by the

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[1] The Old Republic Policy added this last sentence to the second definition of insured where it probably makes more sense. (See Exhibit "C") The Special Instructions (Number 2) allow for the rearrangement and optional sequence of portions of the forms.

Commissioner. (See attached Exhibit "E") The third definition of who is an insured as required in a standard policy (Anyone liable for the conduct of an insured) has not been superseded by a void endorsement.

The Pennsylvania endorsement is clearly void under existing case law, statutory law and administrative law. The insurance policy issued by Old Republic Insurance Company without this endorsement provides $1,000,000.00 liability coverage to Emilio Urrutia since he was an authorized driver under the rental agreement. Futhermore, without this endorsement it is immaterial how much insurance was contracted for between Penske and Urrutia.

But the simplicity of this case is muddled by this Court. On Page 4 of this Court's opinion, it references the Court of Appeals applying Article 5.06(2) to the rental contract and concluding "that the rental agreement between Penske and Urrutia was void as insurance because the agreement was not "written into" the Old Republic policy." It continues and says " The court did not find a similar problem with the Pennsylvania endorsement, however, which allowed Penske to extend its insurance to Urrutia." Of course not. The Pennsylvania endorsement was written into the policy. However, the Court of Appeals never found the Pennsylvania endorsement "valid" as the next sentence boldly states. On the contrary, the Court of Appeals factually found that "it is uncontested that the endorsement form involved in this case was not prescribed or approved by the State Board of Insurance." (P.5). Prior to this statement and within the same paragraph the Court stated "Insurers are required by law to use the endorsement forms prescribed by the State Board of Insurance" and cited this Court's case of Springfield v. Aetna Cas. & Sur. Co., 620 S.W.2d 557, 558 (Tex. 1981). Although the Court of Appeals never specifically found the Pennsylvania endorsement void it would follow as a logical conclusion. Regardless of whether the Court of Appeals did or did not void the Pennsylvania endorsement it is the duty of this Court to do so since it is violative of Texas law.

This Court has concluded that the rental contract is an endorsement as well. (P.5 "The Texas rental contract was thus also an endorsement to the Old Republic policy, supplying the limits of coverage and extending those benefits to the customer identified

therein as accepting Penske's offer of insurance.") Rather than hold either of the endorsements in this case void, however, this Court cites its own decision in *Commercial Union Assurance Co. v. Preston*, supra for the proposition that the language in the unapproved endorsement must conflict with board-approved provisions in order to be unenforceable. (P.6) Since the rental contract did not conflict with any approved standard form this Court concludes the facts in this case are distinguishable fro those in *Commercial Union*. This is the most egregious misrepresentation of the law in this entire case. *Commercial Union* found that an unapproved endorsement is VOID. What is it about the word void that this Court does not understand? I *Commercial Union* this Court wrote (P.565) "The indorsement relied on to defeat liability for the loss by fire of the moving picture machines and compenare would seem not only void (emphasis added) as never having been authorized or approved by the commission, but it appears to us that it may be inconsistent with the prescribed proviso, embodied in the policy sued upon, ..." (emphasis added). Prior to making this statement, this Court stated "We agree with the Court of Civil Appeals that a clause or endorsement added to the standard form of fire insurance policy, without the authorization or approval of the state insurance commission, is void (emphasis added) under article 4891, Complete Texas Statutes, now articles 4888 and 4889, R.S. of 1925; otherwise true effect cannot be given to the prohibition that no other forms be used than those established or approved by the commission (emphasis added)." This Court then cited its own case of *First Texas State Ins. Co. v. Smalley*, 111 Tex. 72, 228 S.W. 550 as authority for the foregoing proposition of law.

In a feeble effort to show concern for an insured, this Court assumes that Urrutia's coverage is dependent on the Texas rental contract and the Pennsylvania endorsement. (P.5) Not so. Any driver using the insured vehicle with the consent of Penske is insured whether he is operating the vehicle under a rental agreement or not.

This Court accuses the Court of Appeals of selective application of the rental contract. (P.5) Not so again. The provision of the rental contract authorizing Urrutia to operate the vehicle is on the first page of the rental contract. The insuring provisions sought to be declared void are on the back. The

authorization to Urrutia to operate the vehicle is a crucial component of a rental contract. The authorized driver must produce a valid Texas operators license. If the company so chooses, it may also obtain a copy of the authorized driver's driving record. This is done so that the rental car company can satisfy its duty and place the vehicle, hopefully, in the hands of a competent driver. Selecting a competent driver has nothing to do with insurance.

On Page 7 of this Court's opinion a host of cases are cited out of various federal courts dealing with unapproved policies. What has unapproved policies got to do with this case? The policy in this case is an approved Texas policy. No one has claimed otherwise since the inception of this case. The one case cited by the Court under these string of cases, *Mutual Life Ins. Co. of N.Y. v. Daddy$ Money, Inc.*, 646 S.W.2d 255 (Tex.App.—Dallas 1982, writ ref. n.r.e.) is misquoted by the Court. That case held that an unapproved endorsement is a nullity whether it conflicts with the policy or not. The remaining federal cases all deal with an insured accepting all or none of an unapproved policy. Perhaps the Court is setting up its arbitrary and capricious ruling by stating in the next paragraph "Urrutia has accepted the benefits extended to hi through the Texas rental agreement." Because of this, the Court concludes "....the court of appeals erred in voiding the insurance provisions in the rental agreement merely because they were not written on forms prescribed by the State Board of Insurance." Had Urrutia accepted the benefits extended to him through an unapproved policy the Court's ruling would be correct, assuming arguendo that unapproved policies are voidable . The minimum limits liability coverage extended to Urrutia was on an unapproved endorsement. Unapproved endorsements are void. The insinuation by the Court that Old Republic has paid $20,000.00 and obtained a release on behalf of Urrutia under a void endorsement somehow creates an estoppel to collect the other $980,000.00 under a valid policy is logic devoid of any reasoning. The insurance company still gets credit for any payment it has made. This Court can cite no other case nor can it offer any legal justification for validating an unapproved endorsement "merely" because it was not written on forms prescribed by the State Board of Insurance. If the Court is overruling those line of cases that hold an unapproved endorsement is void and is now holding them

voidable then it should have the courage to say so. This Court has the power to do that. But to intentionally misapply unapproved policy law to unapproved endorsement law solely to favor an insurer is not only a violation of DECKER'S constitutional rights but is also a violation of the judicial canon of ethics. (Canon 3B[2] A judge shall be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism; Canon 3B[8] A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law [emphasis added]) Futhermore, to arbitrarily hold the unapproved endorsements voidable in this case and void in every other case is a denial of DECKER'S rights under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Finally, by footnote on page eight of the opinion, the Court cites pending legislation affecting rental car companies. The Court makes the curious comment that "The Commissioner of Insurance has, in turn, adopted new policy forms and rules to implement the new statute." What about the forms and rules already in place at the time this policy was issued? The Insurance Commissioner has already promulgated forms and delineated rules which this Court chooses to ignore. Endorsement forms affecting rental car agencies (which also applied to trucks) were passed out to each member of the Court at oral arguments on January 13, 1999. No mention of these forms is contained in this opinion. They are attached hereto as Exhibit "E" for this Court to ignore one more time before this case passes on to federal courts.

CONCLUSION

The Pennsylvania endorsement is void under Article 5.06(2) of the Insurance Code, the Special Instructions promulgated by the Insurance Commissioner and the Supreme Court decisions heretofore issued by this Court. The rental contract is void as an endorsement to the policy under the sam authorities. Failure of the Court to apply the well established statutory and case law to the undisputed facts in this case constitute an arbitrary and capricious denial of DECKER'S rights under the Equal Protection Clause and the Due Process Clause

contained in the Fourteenth Amendment of the United States Constitution.

WHEREFORE, PREMISES CONSIDERED, DECKER prays this Court grant this motion for rehearing and declare the Pennsylvania endorsement void, declare the insurance provisions in the rental contract void and affirm the decision of the Court of Appeals.

Respectfully submitted,

Dan Hennigan
Attorney for Appellant
1100 Nasa Road One Suite, 204
Houston, Texas 77058
Voice: 281-333-2933
Facsimile: 281-333-2940
TBA#09473000

Certificate of Service

The undersigned hereby certifies that on this the ___day of _____,1998 a true and correct copy of the foregoing was delivered to all opposing counsel in a manner specified by the Texas Rules of Civil Procedure.

Dan Hennigan

APPENDIX C

Exhibit "A"

TEXAS
STANDARD PROVISIONS FOR TEXAS AUTO POLICIES
BUSINESS AUTO COVERAGE FORM
GARAGE COVERAGE FORM
TRUCKERS COVERAGE FORM
SPECIAL INSTRUCTIONS

1. Standard Language

These forms are expressed in standard language which may not be amended and no part of which may be omitted except (a) as indicated by these instruction, or (b) as indicated in reference notes shown below referring to specific portions of the form, or (c) by an endorsement which states an amendment or exclusion of som provision of the form in accordance with the provisions of a manual rule, in the form of which endorsement has been approved by the Board.

2. Optional Sequence and Arrangement - Coverage Designations or Titles

Several portions of the forms may be rearranged in such sequence or arrangement the company elects, however, the coverage designations or titles such as **"Section 1 - COVERED AUTOS"**, exclusion identifications such as exclusion2. and titles of the various **CONDITIONS** such as **"DUTIES IN THE EVENT OF ACCIDENT, CLAIM, SUIT OR LOSS"** may not be amended.

3. Addition of Coverage by Endorsement

When insuring agreements and other provisions relating to any particular class of insurance are added to these policies by endorsement, such additional insurance must be expressed in the standard endorsement language prescribed or approved by the Board. Appropriate

connective language which does not amend the expression of coverage is permissible and superfluous language or portions such as the standard attaching clause may be omitted.

4. **Definition of "Standard" and "Approved"**

"Standard form" or "standard language" or "approved standard language" when used in these instructions means the forms and endorsements prescribed or approved by the Board.

APPENDIX D

Exhibit "B"

1. WHO IS AN INSURED

The following are insureds:

a. You for any covered auto.

b. Anyone else while using with your permission a covered auto you own, hire or borrow except:

(1) The owner of a covered auto you hire or borrow from one of your employees or a member of his or her household.

(2) Someone using a covered auto while he or she is working in a business of selling, servicing, repairing or parking autos unless that business is yours.

(3) Anyone other than your employees, partners, a lessee or borrower or any of their employees, while moving property to or from a covered auto.

(4) A partner of yours for a covered auto owned by him or her or a member of his or her household.

c. Anyone liable for the conduct of an Insured described above but only to the extent of that liability. However, the owner or anyone else from whom you hire or borrow a covered auto is an insured only if that auto is a trailer connected to a covered auto you own.

APPENDIX E

Exhibit "C"

1. WHO IS AN INSURED

The following are "insureds":

a. You for any covered "auto",

b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:

(1) The owner or anyone else from whom you hire or borrow a covered "auto". This exception does not apply if the covered "auto" is a "trailer" connected to a covered "auto" you own.

(2) Your employee if the covered "auto" is owned by that employee or a member of his or her household.

(3) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking or storing "autos" unless that business is yours.

(4) Anyone other than your employees, partners, a lessee or borrower or any of their employees, while moving property to or from a covered "auto".

(5) A partner of yours for a covered "auto" owned by him or her or a member of his or her household.

c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

APPENDIX F

Exhibit "D"

OLD REPUBLIC INSURANCE COMPANY

Additional Premium_____
Return Premium_____

This endorsement effective _____, forms a part of policy No. ML 14804-03 issued to _____

WHO IS AN INSURED

It is agreed Section II. A. 1 of Business Auto Coverage For CA0001 (12-93) is amended to include the following:

C. Both lessees and rentees of covered autos as insureds, but only to the extent and limits of liability agreed to under contractual agreement with the named insured.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, agreements or limitations of the Policy or any Endorsement attached thereto, except as herein set forth.

This endorsement shall not be valid until countersigned by a duly authorized representative of the Company.

Attest:

/s/ Secretary /s/ President

Countersigned at _____this _____day of _____ 19_____

_____Authorized Representative.

APPENDIX G

Exhibit "E"

TE 20 13A
(Ed. Effective 3/92)

LEASING OR RENTAL CONCERNS - SCHEDULE OF LIMITS FOR OWNED AUTOS

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
GARAGE COVERAGE FORM
TRUCKERS COVERAGE FORM

SCHEDULE

Named **Insured**_____
Designation of **Autos**

	Limits of Insurance		
Autos leased or rented under a leasing or rental agreement for one year or more	Combined Limit of Liability Per Accident	Bodily Injury Liability per Person/per accident	Property Damage Liability Per Accident
Private passenger autos	$_____	$_____	$_____
Commercial autos	$_____	$_____	$_____
Other	$_____	$_____	$_____
Autos leased or rented under a leasing or rental agreement for less than one year	$_____	$_____	$_____
Private passenger autos	$_____	$_____	$_____
Commercial autos	$_____	$_____	$_____
Other	$_____	$_____	$_____
Autos owned by you and not Subject to a lease or rental Agreement	$_____	$_____	$_____

EFFECTIVE MARCH 18, 1992

TE 20 14B
(Ed. Effective 3/92)

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
GARAGE COVERAGE FORM
TRUCKERS COVERAGE FORM

A. Autos leased to others for one year or more:

The Limit of Insurance shown in this endorsement replaces the Limit of Insurance shown else where in the policy or in any lease or rental agreement of one year or more that requires a lessee or rentee to provide primary insurance for you, subject to the following provisions:

For the difference between the second level Limit of Insurance and the primary Limit of Insurance shown in any lease or rental agreement of one year or more which requires a lessee or rentee to provide primary insurance for you. WHO IS AN INSURED applies except that none of the following is an insured:

1. the lessee or rentee;
2. any employee or agent of the lessee or rentee; and
3. any person operating an auto with the permission of any of the above.

SCHEDULE

	Primary Limits of Insurance	Excess Limits of Insurance	
Combined liability	_____	_____	each accident
Bodily Injury	_____	_____	each person
Property Damage	_____	_____	each accident

Type of Vehicles	Rate Per Auto at Second Level	Rate Per Auto at Primary Limits	Premiu Difference	Premium Per Auto	No. of	Total Premium
Priv. Pass.	-	-		x.50	x	=
Commercial	-	-		x.50	x	=

B. Autos leased or rented to others for less than one year:

The Limit of Insurance shown in this endorsement replaces the Limit of Insurance shown elsewhere in the policy, (indicated below in the schedule as primary limits) subject to the following provisions:

For the difference between the Limit of Insurance shown in this endorsement and the Limit of Insurance shown elsewhere in the policy, WHO IS AN INSURED applies except that none of the following is an insured:

1. any lessee or rentee not described in paragraph A above;
2. any lessee or rentee of an auto rented for less than one year;
3. any employee or agent of the lessee or rentee; and
4. any person operating an auto with the permission of any of the above.

SCHEDULE

	Primary Limits of Insurance	Excess Limits of Insurance	
Combined liability	_____	_____	each accident
Bodily Injury	_____	_____	each person
Property Damage	_____	_____	each accident

Type of Vehicles	Rate Per Auto at Second Level		Rate Per Auto at Primary Limits		Premiu Difference	Premium Per Auto	No. of		Total Premium
Priv. Pass.		-		-		x.50	x	=	
Commercial		-		-		x.50	x	=	

EFFECTIVE MARCH 18, 1992

APPENDIX H

IN THE SUPREME COURT OF TEXAS

No. 98-0554

EMILIO URRUTIA AND PENSKE TRUCK LEASING CO., L.P., PETITIONERS

V.

FEROL DECKER, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued January 13, 1999

CHIEF JUSTICE PHILLIPS delivered the opinion for a unanimous Court.

This case requires us to determine the validity of liability insurance a truck leasing company provided to its customer as part of a rental transaction. Based on representations that $20,000 was all the insurance available, the claimant settled his bodily injury claim for that amount. When he later discovered the nature of the leasing company's insurance arrangement, he sued the leasing company and its customer, seeking to set aside the previous settlement. The claimant urged that the settlement was obtained by fraud or resulted from the parties' mutual mistake about the insurance available to pay his claims.

The trial court granted summary judgment for the leasing company and its customer. The court of appeals reversed and remanded, holding that the claimant had raised a fact issue on

mutual mistake because the rental agreement was not written on a form approved by the State Board of Insurance and was not written into the policy, as required by article 5.06(2) of the Texas Insurance Code. At a minimum, the court held, this failure raised a fact issue about whether the rental agreement was effective to limit the customer's liability insurance to $20,000 instead of the much larger sum available under the leasing company's master policy. 965 S.W.2d 26. Because we disagree with the court of appeals' conclusion about the effect of the rental agreement, we reverse the judgment of the court of appeals and rendered judgment that the claimant take nothing.

Old Republic Insurance Company insured Penske Truck Leasing Company under a commercial business auto policy. This policy, issued in the state of Pennsylvania, provided one million dollars of liability protection to Penske. An endorsement to the Old Republic policy [the "Pennsylvania endorsement"] enlarged the policy's definition of "insured" to include certain customers of Penske as follows:

> WHO IS AN INSURED
>
> It is agreed Section II.A.1 of Business Auto Coverage Form CA0001 (12-93) is amended to include the fol-Lowing:
>
> C. Both lessees and rentees of covered autos as Insureds, but only to the extent and for the Limits of liability agreed to under contractual Agreement with the named insured.

This endorsement authorized Penske to add any rental customer as an insured under the Old Republic policy for the liability limits negotiated in a particular rental agreement.

Emilio Urrutia leased a truck from Penske in Houston. As part of the transaction, Penske agreed to provide liability protection to Urrutia. The rental agreement limited this insurance to the minimum coverage required by our state financial responsibility law.[1] The rental agreement accordingly provided

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[1] Paragraph 6 of the Rental Agreement provided in pertinent part(cont'd)

Urrutia with liability coverage of $20,000 for bodily injury to a single third party. See TEX. TRANSP. CODE § 601.072 (prescribing minimum liability protection of $20,000/$40,000/$15,000).

While operating the Penske truck, Urrutia collided with a car driven by Ferol Decker. Mr. Decker sustained serious injuries and incurred substantial medical expenses. He nevertheless agreed to settle his personal injury claims against Urrutia and Penske for $20,000 because he understood from an insurance adjuster calling on behalf of Urrutia that this was all the insurance available. As part of the settlement, Decker released both Urrutia and Penske. Later, Decker learned about Penske's million-dollar liability policy and filed this suit, seeking to reopen his personal injury claim.

Urrutia and Penske asserted the settlement agreement in defense and moved for summary judgment against Decker. Decker responded that the settlement was invalid because it was obtained by fraud or mutual mistake. The trial court disagreed and granted summary judgment.

The court of appeals reversed and remanded, concluding that the parties made a mutual mistake of fact by reading the rental agreement to limit Urrutia's liability coverage to $20,000. The court of appeals held that the rental agreement could not effectively limit coverage because the insurance provisions in that

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(cont'd) 6.LIABILITY PROTECTION (L.P.). The party (either: Lessor or Customer) as indicated by the initials or signature of the person signing this Agreement on the reverse side shall, at its sole cost, provide liability protection for Customer and any operator authorized by Lessor, and no others, and for Lessor and its partners and their respective agents, servants and employees, in accordance with the standard provision of a Basic Automobile Liability Insurance Policy as required in the jurisdiction in which Vehicle is operated, against liability for bodily injury, including death and property damage arising out of the ownership, maintenance, use and operation of Vehicle as permitted by this Agreement, with limits as follows:

(A) IF "LESSOR PROVIDES L.P." IS INITIALED ***LESSOR SHALL PROVIDE: IF A TRUCK, primary coverage of $10,000 each person, $20,000 each accident for bodily injury, including death and $5000 each accident for property damage or with limits of liability up to the requirements of the Financial Responsibility Law or other applicable statute of the state or municipality in which the accident occurred whichever is greater.

agreement were void under article 5.06(2) of the Texas Insurance Code. 965 S.W.2d at 29.

Article 5.06(2) provides that a "contract or agreement not written into the application and policy is void and of no effect." TEX. INS. CODE art 5.06(2). Applying this statute, the court of appeals concluded that the rental agreement between Penske and Urrutia was void as insurance because the agreement was not "written into" the Old Republic policy. The court did not find a similar problem with the Pennsylvania endorsement, however, which allowed Penske to extend its insurance to Urrutia. The court of appeals did not explain why the Pennsylvania endorsement was valid to amend the policy while the Texas rental contract was not.

Penske suggests that the court of appeals must have reasoned that the Texas rental agreement was not a part of the Old Republic policy because it was not attached to the policy like the Pennsylvania endorsement. But the rental agreement did not have to be attached to the Old Republic policy to be effective. In *Fidelity Union Life Ins. Co., v. Methven*, 346 S.W.2d 797,800 (Tex. 1961), we concluded that all endorsements "should be attached to insurance policies, but failure to attach them does not invalidate them." Texas law has long provided that a separate contract can be incorporated into an insurance policy by an explicit reference clearly indicating the parties' intention to include that contract as part of their agreement. *Goddard v. East Tex. Fire Ins. Co.*, 1 S.W. 906, 907 (Tex. 1886).

Moreover, although the court of appeals held that the rental agreement was void for insurance purposes, it nevertheless relied on the agreement to identify Urrutia as an insured. The court did not explain why the rental contract was void for the purpose of defining Urrutia's coverage but valid for the purpose of making Urrutia an insured in the first place. We find no justification for this selective application of the rental contract.

Urrutia's coverage under the Old Republic policy depended on both the Texas rental contract and the Pennsylvania endorsement. The Pennsylvania endorsement enlarged the policy's definition of "insured", authorizing the named insured, Penske, to add to its rental customers as additional insureds. The endorsement, however, allowed Penske to determine in the rental contracts themselves which customers would be insured and the

amount of their respective coverage. An insurer may validly agree to add as an additional insured "any person or organization to which the named insured is obligated by virtue of a written contract to provide insurance." 21 DORSANEO, TEXAS LITIGATION GUIDE § 341.07[2][h] at 341-57 (July 1998), *citing Forest Oil corp. V. Strata Energy, Inc.*, 929 F. 2d 1039, 1044-45 (5th Cir.1991). Such an endorsement also "may provide lower coverage limits to the additional insured than to the named insured", as the rental contract did here. *See id.*, DORSANEO at 341-57-58. The Texas rental contract was thus also an endorsement to the Old Republic policy, supplying the limits of coverage and extending those benefits to the customer identified therein as accepting Penske's offer of insurance.

Furthermore, the Pennsylvania endorsement clearly referred to the rental agreements between Penske and its rental customers as the basis for extending and limiting insurance coverage to these customers. Accordingly, Penske's rental agreement with Urrutia was sufficiently "written into" the Old Republic policy through the Pennsylvania endorsement. The insurance provisions in the rental agreement were therefore not void by reason of inadequate incorporation into the policy.

The court of appeals also held that the Texas rental contract was void as an endorsement to the Old Republic policy because it was not in a form approved by our State Board of Insurance. While we agree that the rental agreement did not have board approval for use as an insurance contract, we do not agree that this rendered the insurance provisions of the rental agreement void.

Insurers doing business in this state are required to use policies and endorsements approved by our state Board of Insurance. TEX. INS. CODE art. 5.06(2). Insurers who do not use board-approved policies and endorsements may be subject to penalty. TEX. INS. CODE art 5.06(2): *Springfield v. Aetna Cas. & Sur. Ins. Co.*, 620 S.W.2d 557, 558 (Tex.1981). Furthermore, these insurers may not be able to enforce agreements written on unapproved forms. This Court has said that an unapproved endorsement or clause that conflicts with an approved provision in a standard form policy is unenforceable. Commercial Union Assurance Co. v. Preston, 282 S.W. 563, 565 (Tex. 1926).

But this case is different fro *Commercial Union*. Here the insurance provisions in the Texas rental contract, while lacking board-approval, do not conflict with any approved standard form policy or provision. In fact, the unapproved Texas rental endorsement to the Old Republic policy is the only basis for extending insurance benefits to Urrutia. To void the insurance provisions in the Texas rental agreement under these circumstances would penalize the innocent insured, not provide him more protection. *See Travelers Ins. Co. v. Chicago Bridge & Iron Co.*, 442 S.W.2d 888, 893 (Tex. Civ., App.--Houston [1st Dist] 1969, writ ref'd n.r.e.)(insured is not deprived of coverage merely because the insurer did not use the approved policy form). Because insurance sold through an unapproved policy is voidable, the insured may, upon learning that the insurance is unapproved, elect to rescind it. If the insured elects to accept the insurance, however, he or she must do so under the agreed terms. *See Imperial Premium Fin., Inc. v. Khoury*, 129 F.3d 347, 350 (5th Cir. 1997)(insured cannot select the good and discard the bad); *Hertz Corp. v. Pap*, 923 F. Supp. 914, 922(N.D. Tex. 1995)(insured cannot chose to void unfavorable language and retain remainder of unapproved policy), aff'd, 98 F.3d 1339 (5th. Cir.1996); *McLaren v. Imperial Cas. & Indem. Co.*, 767 F. Supp. 1364, 1376(N.D. Tex.1991)(insured must take or leave the policy in its entirety), aff'd 968 F.2d 17 (5th Cir. 1992), *cert. denied*, 507 U.S.915(1993); *cf. Mutual Life Ins. Co. of N.Y. v. Daddy$ Money, Inc .*, 646 S.W.2d 255, 257 (Tex.App.--Dallas 1982, writ ref'd n.r.e.)(when policy has board approval but conflicting endorsement does not, insurer cannot enforce endorsement).

In this case, Urrutia has accepted the insurance benefits extended to him through the Texas rental agreement. Accordingly, the court of appeals erred in voiding the insurance provisions in the rental agreement merely because they were not written on forms prescribed by the State Board of Insurance.[2]

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[2] Since the accident in this case, the Legislature has enacted new legislation, clarifying the application of insurance laws to car rental companies. See TEX. INS. CODE art. 21.07 §21 (Rental Car Companies); see also Tex. S.B. 522. 76th Leg., R.S. (1999)(proposing to amend section 21 to include trailers and trucks). The commissioner of insurance has, in turn, adopted new policy forms and rules to implement the new statute. See commissioner of Insurance Order No. 98-0513, 23

In summary, the liability insurance Penske sold Urrutia was voidable because it did not have board approval. It was not void, however. Furthermore, the Texas rental agreement was sufficiently incorporated into the Old Republic policy to satisfy the requirements of article 5.08(2). Finally, the rental agreement clearly limited the liability protection extended to Urrutia to $20,000 for bodily injury. Accordingly, we reverse the judgment of the court of appeals and render judgment that Decker take nothing.

/s/ Thomas R. Phillips
Thomas R. Phillips
Chief Justice

Opinion delivered: April 8, 1999

Tex. Reg. 4927 (May 15, 1998)("Adoption of a Texas Automobile Rental Liability Policy and a Texas Automobile Rental Liability Excess Policy and amendments to the Texas Automobile Rules and Rating Manual to Provide Rules and Rates Governing Such Policies").

APPENDIX I

Opinion issued April 30, 1998

In The

Court of Appeals

For The

First District of Texas

No. 01-96-01560-CV

FEROL DECKER, Appellant

V.

EMILIO URRUTIA AND PENSKE TRUCK LEASING CO., L.P., Appellees

On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 96-018236

OPINION ON MOTION FOR REHEARING

We overrule the motions for rehearing filed by defendants Urrutia and Penske. In doing so, we note that the *Schlumberger* case[1] relied on by defendants is distinguishable from the present case.

Defendants argue that under *Schlumberger* the release signed by plaintiff bars recovery. I *Schlumberger*, the very purpose of the release was to end the dispute about the value of the joint project, and, therefore, the plaintiffs were bound by the

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1 *Schlumberger Technology Corp. v. Swanson*, 41 Tex. Sup. Ct. J. 165 (1997).

disclaimer of reliance on representations *regarding value*. *Id.* At 172.[2] In the present case, there is evidence that there *was never a dispute* about the *maximum limits* of available insurance coverage; rather, there is evidence that *both parties* were *mistaken* about the limits of available coverage.

The general rule applies in the present case: a release is a contract, and like any other contract, is subject to avoidance on grounds such as mutual mistake. *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990).

/s/ Margaret Garner Mirabal
Margaret Garner Mirabal, Justice

Panel consists of Justices Mirabal, Hedges and Andell.

Publish, TEX. R. APP. P. 47.

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[2] The supreme court in *Schlumberger* specifically emphasized that "a disclaimer of reliance...will not always bar" a claim, and it specifically limited its holding to the facts before it. *Id.* At 172.

APPENDIX J

Opinion issued February 12, 1998

In The

Court of Appeals

For The

First District of Texas

No. 01-96-01560-CV

FEROL DECKER, Appellant

V.

EMILIO URRUTIA AND PENSKE TRUCK LEASING CO., L.P., Appellees

On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 96-018236

OPINION

Following an automobile accident, plaintiff Ferol Decker settled his claims against defendant Emilio Urrutia (the driver of the other vehicle, a rented truck) and defendant Penske Truck Leasing Co., (the truck rental company). After the settlement, plaintiff sued the defendants for negligence, alleging the settlement was void due to fraud or mutual mistake. Plaintiff appeals a take-nothing summary judgment in favor of both defendants. We reverse and remand.

On June 5, 1995, the driver of the rental truck crossed the road center line and struck plaintiff's car head-on, causing plaintiff

to incur over $100,000 in medical expenses. Plaintiff alleged that several days after he was released from the hospital, an insurance adjuster calling on behalf of the truck driver told plaintiff there was only $20,000 of insurance coverage to pay his personal injury claim. The same representation was made to plaintiff's attorneys by an adjuster representing the interests of the rental company. Plaintiff settled his personal injury claim for that amount.
As part of his settlement, plaintiff signed a release, releasing both defendants from any liability arising from the June 5, 1995 accident.

According to plaintiff's summary judgment affidavit, he later learned from a Penske Truck rental agent that the leasing company actually had one million dollars coverage. Plaintiff hired a new attorney and sued the defendant driver for negligence and the leasing company for negligently leasing the truck to the defendant driver. Defendants answered, asserting affirmative defenses of release, accord and satisfaction, and estoppel.

The leasing company filed a motion for summary judgment asserting that, based on the release, which established its affirmative defenses of release, accord and satisfaction, estoppel, and payment, it was entitled to a take-nothing judgment, as a matter of law. In response, plaintitf filed a supplemental pet8ition and a response to the motion for summary judgment, asserting the release was void because of fraud or, alternatively, that the parties were mutually mistake regarding the amount of coverage available for his claims. Plaintiff supported his summary judgment response with the pleadings, answers to interrogatories, and requests for admissions on file, as well as with affidavits by himself and two attorneys who had represented him after the accident.

The leasing company filed a reply to plaintiff's response, and in it requested summary judgment for the defendant driver as well as itself. The trial court granted a summary judgment ordering that plaintiff take nothing on his claims against both defendants.

In his first and second points of error, plaintiff asserts the trial court erred in granting summary judgment for defendants. Specifically, plaintiff argues that the summary judgment evidence raises fact issues about his claims of fraud and mutual mistake.

Summary judgment is proper only when a movant establishes that there is no genuine issue of material fact and that

the movant is entitled to judgment as a matter of law. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); *Bangert v. Baylor College of Medicine*, 881 S.W.2d 564, 566 (Tex. App.--Houston [1st Dist.] 1994, writ denied). In reviewing the summary judgment, we will take all evidence favorable to the nonmovant as true indulging every reasonable inference in favor of the nonmovant and resolving any doubt in its favor. Johnson, 891 S.W.2d at 644; *Bangert*, 881 S.W.2d at 565-66. Fraud and mutual mistake are affirmative defenses in the nature of confession and avoidance, and for a nonmovant/plaintiff to use them in a summary judgment proceeding to defeat a movant/defendant's establishment of release, the plaintiff has the burden of raising a fact issue with respect to them. *Williams v. Glash*, 789 S.W.2d 261, 263-64 (Tex. 1990); *Deer Creek Ltd. v. North Am. Mortgage Co*, 792 S.W.2d 198, 201 (Tex. App.--Dallas 1990, no writ).

Both parties agree that this case turns on whether, in fact, the amount of available insurance coverage was $20,000. If such was the case, there was no misrepresentation and no mistake.

The insurance policy providing coverage in this case was issued by Old Republic Life Insurance Company to the defendant truck leasing company. The policy provides for one million dollars in liability coverage per accident, and includes as covered "insureds" people like the defendant truck driver who leased the truck from the leasing company. The dispute in this case centers around the effect of an endorsement to the insurance policy, which amends the section defining "insureds" as follows:

WHO IS AN INSURED

> It is agreed Section II. A. 1 of Business Auto Coverage Form CA0001 (12-93) is amended to include the following:
>
> C. Both lessees and rentees of covered autos as Insureds, but *only to the extent and for the limits of liability agreed to under contractual agreement* with the named insured.

It is uncontested that the *rental agreement* between the

defendant driver and the defendant truck leasing company provides for liability insurance coverage[1] up to the requirements of the applicable financial responsibility law, i.e., in the present case, *only up to $20,000* for bodily injury arising from an accident.[2] However, it is plaintiff's position that the insurance provision in the *rental agreement* is void because it is not written on a for prescribed by the State
Board of Insurance, nor is it written into the main insurance policy. Further, plaintiff argues the endorsement (quoted above) itself is a nullity because Old Republic Insurance Company did not use the required endorsement form. Plaintiff relies on the following provisions of the Insurance Code:

> Art. 5.06. Policy Forms and Endorsements
>
> (1) The Board shall adopt a policy form and Endorsements for each type of motor vehicle Insurance subject to this subchapter...
>
> (2) Except as provided by subsections (3) and (4)[3] of this article, an insurer may only use a form adopted by the Board under this section in writing motor vehicle insurance delivered, issued for delivery, or renewed in this State. A contract or agreement not written into the application and policy is void and of no effect and in violation of the provisions of this subchapter, and is sufficient cause for revocation of license of such insurer to write automobile insurance within this State.

TEX. INS. CODE. ANN. Art. 5.06 (Vernon Supp. 1998).

Plaintiff attached to his summary judgment response relevant forms that have been prescribed by the Insurance Board, including an endorsement form to be used to reduce the limits of

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1 The driver elected to purchase the auto liability insurance coverage through the leasing company.

2 Texas Transportation Code Annotated §601.072 (Vernon Pamph. 1998)

3 Subsections (3) and (4) are not relevant.

automobile liability insurance coverage for leased vehicles. Attached as an appendix to this opinion is the approved endorsement form for such purpose. Plaintiff summarized his position as follow:

> The fly in the ointment was put there by Old Republic. Although it used a policy in substantial Compliance with that promulgated by the Board, it Failed to use the endorsement specifically designed To limit coverage to lessees. Instead, it chose to attach an endorsement to the policy on which it attempted to delegate authority to [the truck Leasing company] to determine the "extent" and "limits of liability" of coverage provided to the lessees in the Rental Agreement. The Rental Agreement was not approved by the Board.

Accordingly, plaintiff argued the insurance provisions in the *rental agreement* are void because they are not written on forms prescribed by the State Board of Insurance, nor are they written into the policy. We agree.

Insurers are required by law to use the endorsement forms prescribed by the State Board of Insurance. *Springfield v. Aetna Cas. & Sur. Co.*, 620 S.W.2d 557, 558 (Tex. 1981). Article 5.06 governs policy forms and endorsements, declaring void and of no effect any agreement not written into the insurance application and policy. *Difrancesco v. Houston Gen. Ins. Co.*, 858 S.W.2d 595, 598 (Tex. App.--Texarkana 1993, no writ); art. 5.06 (2) (Vernon Supp. 1998). It is uncontested that the endorsement form involved in this case was not prescribed or approved by the State Board of Insurance. The portion of the separate rental agreement that stated the extent and limits of liability coverage was an agreement "not written into the application and policy," and therefore, as a matter of law, said limitations on coverage were "void and of no effect." TEX. INS. CODE ANN., art. 5.06 (2).[4]

Accordingly, the mount of insurance coverage available to

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[4] We note that defendants have cited authorities from other jurisdictions in support of their position, but none of defendants' cases involved statutory provisions similar to the Texas statute that controls here.

pay plaintiff's personal injury claim was not limited to $20,000.00. At a minimum, the summary judgment evidence raises a fact issue with regard to plaintiff's affirmative defense of mutual mistake. Therefore, we sustain plaintiff's points of error one and two.

We reverse the summary judgment and remand the case to the trial court for further proceedings.

/s/ Margaret Garner Mirabel
Margaret Garner Mirabel, Justice

Justices Hedges and Andell also sitting.

Publish. TEX. R. APP. P. 47.

APPENDIX K

JUSTICE FOR SALE

MIKE WALLACE: Every American knows it: Money, campaign cash, is the mother's milk of politics, and the folks who nourish the candidates expect something in return. Even judges are not immune. In eight states across America, justices on the state supreme courts still have to beg for campaign cash to get themselves elected, Republicans and Democrats. We went to Texas back in 1987 to tell that story, and it caused quite a stir there, so we decided to take another look at Texas this election year to find out if justice is still for sale in Texas. But first, here's an inside look at the way it went 11 years ago.

(*Footage of Joe Jamail greeting people at a judges conference*)

Mr. JOE JAMAI : Hello, Bianca.

WALLACE: (*Voiceover*) Back in 1987, Joe Jamail, one of the most successful and one of the richest lawyers in the country, invited us to tag along to a judges conference down in Corpus Christi, Texas. Jamail has had cases worth billions before the Texas Supreme Court.

Mr. JAMAIL: What do you think about it all, Judge?

Unidentified Judge: Padre.

Mr. JAMAIL: How are you?

Judge: Fantastic.

WALLACE: (*Voiceover*) It was a back-slapping, boozy affair. The flamboyant Jamail knew all the judges, and he agreed to wear a 60 MINUTES wireless microphone so that we could hear hi work the room.

Mr. JAMAIL: Judge, how are you? I'm wired up for 60 MINUTES.

WALLACE: (*Voiceover*) Jamail was proud to acknowledge he had contributed $22,000.00 to this judge's campaign, $7,000 to this one, and some $45,000 to this one. But Jamail denied he was trying to buy influence with the court.

Mr. JAMAIL: Well, who else would help? I know him about as well as anybody. I know what his philosophy is. You know, is he going to go to his enemies? Are they going to give him gi- campaign contributions? That's bullshit and naïve. You know it, and I know it. And tell me-first off, our laws permit this.

WALLACE: Well, Texas law did permit it. Nonetheless, our report back in 1987 sent shock waves through Texas. Corporations and insurance companies especially, which had been losing some very big lawsuits before the court, were convinced that lawyers like Jamail were, in effect, buying favorable opinions from the judges.

(*Editorial cartoon shown of a clown behind a judge's bench, a scale on the bench which has a money bag weighing down one side, and a sign which reads, "Texas Judicial System"*)

WALLACE: (*Voiceover*) After our report aired, some editorial cartoonists painted the court as a bunch of corrupt clowns.

(*Close-up of sign on building reading, "Texas Medical Association"; footage of Kim Ross talking with Wallace*)

WALLACE: (Voiceover) And the Texas Medical Association spread the word that the court, by approving fat malpractice awards, was putting some doctors out of business. So Kim Ross, the doctors' chief lobbyist, decided to retaliate.

So you said, "We're going to get rid of this court"

Mr. KIM ROSS: Yeah, yeah. We said, "This isn't right. Something has to be done."

(*Footage of several campaign ads that were run in Texas*)

WALLACE: (*Voiceover*) Kim Ross launched an all-out attack on the old court in 1988 and, joined by big business, he funded a group of candidates he called the clean slate. Some of those candidates even used our report in their commercials to paint the old court as corrupt and bad for Texas.

(*Excerpt from campaign ads that were run in Texas*)

WALLACE: (*From campaign ad*) Is justice for sale in Texas?

Announcer #1: (*From campaign ad*) (*Voiceover*) 60 MINUTES asked that question. Tom Phillips has said no to big money.

WALLACE: (*Voiceover*) Tom Phillips, the chief justice, told us that commercial helped him win the election.

(*Footage of Texas Supreme Court proceedings; Walt Borges walking through courthouse and sitting in court.*)

WALLACE: (*Voiceover*) Four other judges on the so-called clean slate also won. But what is it they've cleaned up? Walt Borges has written about the court for 10 years, first as a reporter, now as a consumer advocate, and he says this new court has been influenced by big money just as much as the old court. He says it's just coming from a different source.

(*Footage of Wallace and Borges*)

WALLACE: Back in 1987, when we did the first piece here, where were the justices at that time getting their contributions from?

Mr. WALT BORGES: They were getting a lot of their contributions from the lawyers, the consumers' lawyers.

WALLACE: Plaintiffs' lawyers.

Mr. BORGES: Plaintiffs' lawyers.

WALLACE: Who won most cases?

Mr. BORGES: The studies that we-we did show that about 67 percent of the time, two-thirds of the time, the plaintiffs won the cases in 1987.

WALLACE: And today?

Mr. BORGES: Today, the defendant wins 69 percent of the time.

WALLACE: (*Voiceover*) By "defendant", Borges means the business and insurance companies who are being sued.

How do insurance companies fare before this court?

Mr. BORGES: The insurance companies win roughly 90 percent of the time.

WALLACE: What you're saying is it went 180 degrees the other way.

Mr. BORGES: The philosophy of the court has shifted. If there is a bias in 1985, there is now a bias the op-opposite direction in 1998.

(*Footage of the outside of a building; Texas Supreme Court justices leaving their bench; close-up of Payola Justice report; Craig McDonald sitting at desk and speaking on the phone*)

WALLACE: (*Voiceover*) Why? An outfit called Texans for Public Justice says the new court, unlike the court in 1987, receives most of its contributions from corporations and doctors, and their lawyers. Their recent report, called Payola Justice, has infuriated the court. But the group's director, Craig McDonald, insists it's right on the money.

(*Footage of Wallace and McDonald*)

Mr. CRAIG McDONALD: We took a look at the campaign finances of this court and found that the members of this Suprem Court, in their quest to raise $9 million for re-election, raised $4 million of that money from the very lawyers and parties who had cases before the court during that period.

WALLACE: Are you suggesting that Supreme Court justices in Texas can still be bought?
Mr. McDONALD: This court seems to reward its highest donors.
(*Footage of Wallace and Borges*)
WALLACE: Are these men and women on the current court dishonest unethical?
Mr. BORGES: As individuals, no. As a system, the system is corrupt, and it leads to corrupt results. A tremendous amount of of business, medical money, was-was mobilized and used to elect a-a court that basically had a singular phil-philosophy, and that was very pro-business, pro-defense.
(*Footage of Rose Spector on the campaign trail*)
WALLACE: (*Voiceover*) And out on the campaign trail last month, Supreme Court Judge Rose Spector is hearing from some Texas voters who are upset about the court's swing to the right.
Unidentified Woman: Our Supreme Court needs some Democrats there to vote against the corporations and the HMOs. We need you there.
WALLACE: (*Voiceover*) A judge for 24 years, Spector has to campaign as if she were running for town council.
Unidentified Man #1: As long as you're a Democrat, that's the main thing.
WALLACE: (*Voiceover*) She's a Democrat in a tight race, and she knows that her campaign is not about the law, it's about politics.
(*Footage of Judge Spector at a speaking engagement*)
Judge ROSE SPECTOR: It's great to be here, great to be among so many Democrats. Our Supreme Court race is close. I need your help.
(*Footage of John Hill; photograph of Texas Supreme Court justices at the time of Hill; Wallace and Hill*)
Former Judge JOHN HILL : It's Democrats vs. Republicans, which is ridiculous. There's no Republican justice or Democratic justice, there's just justice.
WALLACE: (*Voiceover*) John Hill was chief justice of the court back in the "80s,

You told me back in '87, you were resigning to reform the system
Mr. HILL: Exactly.
WALLACE: And it hasn't been reformed up to now?

Mr. HILL: Well, it hasn't been perfectly reformed. We've put limitations on the amount of contributions.

WALLACE: How much?

Mr. Hill: Five thousand dollars per individual. That's not low enough to suit me, but that was the compromise.

(*Close-up of Senate bill; graphic on screen, "Law firms, $30,000; political action committees, $300,000"; Wallace and Hill*)

WALLACE: (*Voiceover*) Under that compromise, however, law firms can still give $30,000, political action committees can give $300,000. And what is the price of a campaign these days for the Supreme Court?

Mr. HILL: It's still outrageous, and I think it's up to about $2 million on the average.

(*Footage of Texas Supreme Court proceedings; Wallace and Bud Shivers; graphic on screen, "Texans for Lawsuit Reform, Working together for a fair, honest and balanced civil justice system"; Wallace and Bud Shivers*)

Unidentified Man #2: Thank you. Be seated.

WALLACE: (*Voiceover*) And even though they have to raise those millions of collars, judges on the court insist they are honest and ethical. And not surprisingly, Bud Shivers agrees. His organization, Texans for Lawsuit Reform, has been a major donor to judges who are pro-business.

Mr. BUD SHIVERS: Today, less than 40 percent of the contributions come from lawyers.

WALLACE: And the 60 percent comes from

Mr. SHIVERS; Ordinary individuals, businesspeople who have no interest before the court, don't anticipate ever having any interest before the court.

WALLACE: Mr. Shivers, 60 percent of the money fro businesses, corporate interests, hospitals? It-it doesn't make sense that they have no interest before the court. They've got to have interest before the court.

Mr. SHIVERS: Business has an absolute interest in a fair and impartial mainstream court.

WALLACE: So this is kind of a disinterested, God-fearing business community. All they're interested in is fair justice.

Mr. SHIVERS: Well I'm not going to speak to their religious beliefs, but I'll tell you why I contribute to members of the

Supreme Court, and that's because I think a fair and impartial judiciary is a bedrock of a civilized democracy.

(*Footage of Wallace walking with State Senator Rodney Ellis; Wallace and Shivers*)

WALLACE: (*Voiceover*) But State Senator Rodney Ellis says that's not the real reason people like Shivers and others contribute to judges' campaigns. Ellis is chairman of a Senate committee that oversees the court.

State Senator RODNEY ELLIS: Most people who give large amounts of money tend to be bottom-line oriented. You don' give campaign contributions just because it's a philanthropic endeavor. And I think those large amounts of money create a distrust on the part of the public. They create a perception that justice is for sale in this state.

(*Footage of Wallace and Hill*)

WALLACE: You say this is a first-rate court.

Mr. HILL: Yes, it is. I think, by-by what I look at it, and that is for traditional judges that go by the law that's written by the Legislature.

(*Footage of Wallace and Hill*)

WALLACE: John Hill resigned as chief justice because he thought that the system was corrupt, joined a law firm, and he thinks that the current court is doing a first-rate job.

Mr. McDONALD: Well the court is doing a first-rate job for Mr. Hill's clients. We're not so sure it's doing a first-rate job for Texas.

WALLACE: All right. Prove to me that they're doing a first-rate job for Mr. Hill's clients.

Mr. McDONALD: Whenever there is a plaintiff involved-victim, if you will, or a consumer up against an HMO, a toxic polluter, an insurance company, a hospital, 80 percent -20 percent, the hospital, the insurance company wins. Those are John Hill' clients. He is happy with the system as it is.

(*Footage of outside of tall office building; secretary at desk; sign on door, "Liddell, Sapp, Zivley, Hill & LaBoon, LLP"; Wallace and Hill*)

WALLACE: (*Voiceover*) And being part of the system means that Hill's Houston law firm still contributes tens of thousands of dollars to Supreme Court candidates.

Mr. Hill: We give money to judges, and it's in varying amounts. I think that's part of our civic responsibility and our legal responsibility, and I feel it very deeply.

(*Footage of Texas Supreme Court proceeding; Judge Nathan Hecht at bench*)

WALLACE: (*Voiceover*) But Hill concedes it's demeaning that judges have to spend that money on TV commercials that have nothing whatsoever to do with the law. Example: Supreme Court Justice Nathan Hecht aired this one.

(*Excerpt from Hecht campaign ad*)

Announcer #2: (*From a*) (*Voiceover*) He's just Nathan, a man never too busy to teach Sunday school, or to entertain the older people at his church.

(*Footage of Wallace and Hill*)

Mr. Hill: Why should they have to go out here and take their time away from their work and their duties to the people and grovel around with lawyers and others to raise enormous amount of money to seek that office, just to say, "I want to stay"?

WALLACE: Do you disagree with the central finding of that Payola Justice report that many of the lawyers and law firms who've given money to the judges still have cases before the court?

Mr. Hill: Well, sure, they have cases before the court. You didn't need a research piece to establish that.

WALLACE: You remember the Havner case, of course.

Mr. HILL: I do, of course.

(*Footage of Hill arguing before the court*)

WALLACE: (*Voiceover*) Pharmaceutical case. You were defending a drug company. Just one week after arguing before the court, you yourself signed a letter to raise money for one of the judges, Judge Baker.

Mr. HILL: Well, the timing of that was-was lousy.

WALLACE: I have the letter here.

(*close-up of letter*)

Mr. HILL: (*Voiceover*) Well, that's fine.

Judge Baker, when he realized that the case was under submission that I was in…

(*Close-up of John L. Hill's signature*)

Mr. HILL: (*Voiceover*)…and that I was a signatory to that-one of the signatories to that letter….

(*Footage of Judge Baker; Texas Supreme Court proceeding; camera pans Texas Supreme Court justices*)

WALLACE: (*Voiceover*) But Judge Baker did not remove himself from the case until the lawyer arguing against John Hill objected to his letter. And the fact is, judges in Texas rarely withdraw from cases just because one of the lawyers or corporations appearing before them has contributed to their campaigns. For years, John Hill has urged the governor to clean up the system by appointing judges to a short term before they have to face the electorate.

(*Footage of Governor George Bush; Wallace and Ross*)

WALLACE: (*Voiceover*) But so far, Governor Bush and the Legislature have refused to go along. Even lobbyist Kim Ross, who spent a lot of money to unseat the old court, agrees that something has to be done.

Mr. ROSS: As you know, this is an arms race.

WALLACE: When you say an arms race, the ammunition is money, both sides.

Mr. ROSS: It ought to be done differently, and there is not a member of that court that wouldn't tell you right now…

WALLACE: From the chief justice on down…

Mr. ROSS: On down, yeah.

WALLACE: …everybody says, "Hey, let's do it differently."

Mr. ROSS: Yeah. In-in-including us.

(*Footage of Texas Supreme Court proceeding; Wallace and Ellis*)

Chief Justice TOM PHILLIPS: That concludes the argument in…

WALLACE: (*Voiceover*) But while the chief justice, To Phillips, calls for reform, he also acknowledges he has raised more money in campaign contributions than any Supreme Court judge in Texas history. State Senator Rodney Ellis says that many judges talk reform down there, but the judges actually lobbied against legislation he sponsored to limit campaign contributions.

What happened?

St. Sen. ELLI : Most people thought the bill was going too far too fast, the limits were too low, so a good number of judges around the state were making calls to members of the Legislature, judges who were concerned about if the limits were too low, they wouldn't be able to raise enough money to get elected.

(*Footage of Hill at desk*)

WALLACE: (Voiceover) And former Chief Justice John Hill says it would be less about money, if only Texans themselves demanded it.

Mr. HILL: We haven't been able to get a coalition together, but we're making a lot of progress, Mike. You helped get this started. I hope you'll help get us over the line. I really beg and implore the people of Texas to change this system. Pray for us it will be successful, because it'll be a great day for Texas.

WALLACE: Take politics, take money out.

Mr. HILL: Out, out, out!

(*Announcements*)